

March 8, 2016

**BY ELECTRONIC AND REGULAR MAIL**

Mr. Matthew G. Jacobs  
General Counsel  
CalPERS  
Lincoln Plaza North  
400 Q Street, Suite 3340  
Sacramento, CA 95811

Re: Public Records Act Request Nos. 2471 and 2330

Dear Mr. Jacobs:

You have received a Public Records Act ("PRA") request, No. 2471, from the First Amendment Coalition ("FAC"), which is similar to PRA 2330, which sought records from and related to your fiduciary counsel, Robert Klausner. The FAC, which I represent, and I believe that your determination on PRA 2330, in which you denied the request for the overwhelming majority of the records, was in error. We trust that upon a re-examination of the issues of fact and law, the FAC's request will be satisfied in full.

The basis asserted for denying virtually all of PRA 2330 was CalPERS' claim that the records were protected by attorney-client privilege. It is hard to see this as a viable position for CalPERS to take, given that Robert Klausner has denied that he is providing legal advice to CalPERS.

During his board interview prior to being engaged, Mr. Klausner maintained that CalPERS should look to its General Counsel for advice on California law issues, and mentioned that his firm did have two attorneys who are licensed in California, one assumes in case CalPERS did want an outside view from his firm on California law matters. Mr. Klausner stated that the role of fiduciary counsel did not regularly involve "the specifics of the law of the jurisdiction".<sup>1</sup> In CalPERS' case, that seems difficult to square with the fact that the nexus of CalPERS' activities lies within California and the duties of public pension funds are set forth at considerable detail in the California constitution.

CalPERS' March 10, 2014 document titled "Search for Outside Fiduciary Counsel" confirms this interpretation. It sets forth the specific areas of expertise and advice sought:

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<sup>1</sup>

<https://www.youtube.com/watch?v=r2dklvIaQw&list=PLIKoYJoLyluK5EbWbwXSia4BjpTsbFiYC&index=64>, beginning at 22:45



Outside counsel is called upon to provide advice and recommendation on issues involving the application of California Constitution article XVI, section 17, coupled with other trust law principles, to various situations. The 1992 amendment of article XVI, section 17 by voter initiative (Proposition 162) potentially raises issues with respect to the Board's role. Other recurring issues involve conflicts of interests, and the Board's responsibilities with respect to its investment authority.

Not only does this section detailing the duties of fiduciary counsel place advice on interpreting the California constitution first and foremost but the minimum requirement also shows the importance of California expertise, by stipulating that the firm must have employees that are licensed to practice in California.

Mr. Klausner reconciled the inconsistency between his view of his role versus the requirements set forth by CalPERS in his board interview by stating that he saw himself as giving "policy advice". Similarly, in a "detailed" interview with Calpensions, after over six months of working with CalPERS, Mr. Klausner said "... his role is 'best practices,' not legal advice."<sup>2</sup>

The fact that Mr. Klausner himself sees his role as giving policy advice, not legal advice, defeats any valid claim of privilege. As the Court of Appeal explained in *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal. App. 3d 1, communications are not privileged unless "the dominant purpose of the particular communication was to secure or render legal service and advice"; in that case, since the employer's labor negotiations could have been conducted by a non-attorney, communications to the attorney relating to the conduct of the negotiations were not privileged.

The Klausner, Kaufman, Jensen & Levinson billing records provided in response to PRA 2330 are consistent with Mr. Klausner's statement that he was acting only as a business advisor. Mr. Klausner, both to the board and in the Calpensions article, emphasized that his firm had two licensed California attorneys, the implication being that if his firm were to render legal advice on California law matters, one of these lawyers would be involved. Yet the heavily-redacted invoices provided in response to PRA 2330 show that for what was then the full billing history of his firm's engagement by CalPERS, "RDK," which is presumably Robert Klausner, was the only attorney billing to CalPERS.

Similarly, videos of board meetings show Mr. Klausner giving his views on California law matters, specifically, the Public Records Act, which cannot be deemed to be privileged, and thus any records on this topic between staff and Mr. Klausner on this topic are subject to disclosure.<sup>3</sup>

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<sup>2</sup> <https://calpensions.com/2015/12/07/calpers-board-at-odds-with-maverick-member/>

<sup>3</sup> [https://www.youtube.com/watch?v=qkj\\_eFGTI2c](https://www.youtube.com/watch?v=qkj_eFGTI2c), at 52:30 and again at 1:07:30.



More generally, the reason for Mr. Klausner's repeated mention of the fact that his firm has California-licensed attorneys (which CalPERS apparently has yet to use) may result from his attentiveness to Evidence Code section 950 on attorney-client privilege. The assumption that this privilege is broadly applicable hinges on this premise: "Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions."

Fiduciary advice is not a "legal transaction." In CalPERS' case, given that its fiduciary duties are set forth in the California constitution, and its employees, board members and beneficiaries' rights are all governed by California law, fiduciary matters would involve out-of-state considerations only on an exceptional basis. Thus we anticipate that CalPERS will disclose all the requested records, save any that it can demonstrate involve extra-territorial legal issues.

Finally, I join with the FAC in expressing my deep concern, having observed Mr. Klausner's interactions with the board, as to the substance of the opinions he has given on the Public Records Act and the rights and duties of board members generally. Government officials by statute have the right to use the Public Records Act on the same basis as private citizens. For Mr. Klausner to suggest otherwise under his role as business advisor, and for him to validate the notion of sanctioning those who seek public records denied them by staff<sup>4</sup>, is deeply troubling, particularly since most of the board assumes he is giving legal advice as opposed to an uninformed and in this case, inaccurate, personal opinion.

It is similarly troubling to have Mr. Klausner suggest that board members are prohibited from criticizing CalPERS' decisions and actions given they are jointly and severally liable for supervision failures.<sup>5</sup> Perversely, CalPERS applauds the Institutional Limited Partners Association's new private equity fee template, when greater fee transparency is to a large degree the result of the effort of a dissident trustee, South Carolina Treasurer Curtis Loftis. As Loftis said by e-mail:

I was fought by senior staff and every trustee on this issue....Placing gag rules on Trustees is treasonous. It is an organized, premeditated breach of established fiduciary responsibilities and is unforgivable.

As a result of Loftis' hard-fought effort, the funds under his supervision have been lauded by both experts like CEM Benchmarking and the financial media as best of breed in the rigor and comprehensiveness of their identification and reporting of private equity fees. Thwarting diligent

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<sup>4</sup> [https://www.youtube.com/watch?v=qkj\\_eFGTI2c](https://www.youtube.com/watch?v=qkj_eFGTI2c), at 58:00 and specifically at 59:40, where Mr. Klausner argues, contrary to the statute, that CalPERS board members have "voluntarily" agreed to sacrifice rights under the Public Records Act

<sup>5</sup> <http://www.cobar.org/index.cfm/ID/596/subID/2571/TRUST/SECTION-1002.-DAMAGES-FOR-BREACH-OF-TRUST/>, see "4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS"

board members by invoking the excuse of bureaucratic inconvenience undermines taxpayers' and beneficiaries' interests.

We ask for an affirmative response to this letter by no later than March 21, 2016. If you have any questions do not hesitate to give me a call.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Olson', with a long, sweeping horizontal line extending to the right.

Karl Olson

Cc: Peter Scheer